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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

JOHN SMITH, individually and as
a representative of the Class,

Plaintiff,

v.

A-CHECK AMERICA INC. d/b/a
A-CHECK GLOBAL,

Defendant.

Case No.: 5:16-cv-00174-VAP-KK

**PLAINTIFF'S NOTICE OF
MOTION AND MOTION FOR
PRELIMINARY APPROVAL
OF THE PROPOSED
SETTLEMENT [UNOPPOSED]**

Date: February 27, 2017
Time: 2:00 p.m.
Judge: Hon. Virginia Phillips
Crtm: 8A

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28

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on February 27, 2017, at 2:00 p.m., or as
3 soon thereafter as may be heard before the Honorable Virginia A. Phillips in
4 Courtroom 8A of the above-entitled court, located at 350 West 1st Street, 8th
5 Floor, Los Angeles, California, 90012, Plaintiff John Smith ("Plaintiff,"
6 "Named Plaintiff," or "Class Representative") will move, and hereby does
7 move, for an entry of Order, pursuant to Federal Rule of Civil Procedure 23(e),
8 for approval of the concurrently filed Settlement Agreement and Release,
9 whereby this Court would:

- 10 a. Find that the requirements for certification of a settlement
11 class have been satisfied, and certify the Settlement Class;
- 12 b. Preliminarily approve the Settlement Agreement as fair,
13 reasonable, and adequate;
- 14 c. Find that the class notice procedure set forth below satisfies
15 the requirements of due process and applicable law;
- 16 d. Set a date for the hearing at which the Court will finally
17 determine the fairness, reasonableness, and adequacy of
18 the proposed Settlement (the "Final Fairness Hearing"),
19 such date to be no sooner than forty-five (45) days after the
20 Opt-Out Deadline;
- 21 e. Appoint John Smith as Class Representative for the
22 Settlement Class; and
- 23 f. Appoint Berger & Montague, P.C., as class counsel to the
24 Settlement Class.

25 Defendant does not oppose this motion. Therefore, Plaintiff requests
26 that this motion be determined without oral argument pursuant to Local Rule
27 7-15 or, in the alternative, Plaintiff requests that the parties be allowed to
28 appear telephonically should the Court require oral argument.

1 This motion is made on the grounds that the Settlement is fair,
 2 reasonable, and adequate, as well as being the product of adverse parties
 3 involved in arm's-length, good-faith negotiations after a year of litigation and
 4 discovery involving experienced class counsel.

5 This motion will be and is based on this Notice of Motion and Motion;
 6 the concurrently filed Memorandum of Points and Authorities; the
 7 concurrently filed Settlement Agreement and Release, fully executed as of
 8 January 27, 2017 (including the five exhibits attached thereto); the
 9 accompanying Declaration of Joseph C. Hashmall; the accompanying
 10 Proposed Order; and all other papers and records on file in this matter.

11
 12 BERGER & MONTAGUE, P.C.

13
 14 Dated: January 30, 2017

By: /s/ Joseph C. Hashmall

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MEMORANDUM OF POINTS & AUTHORITIES

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I. INTRODUCTION

Named Plaintiff John Smith (“Plaintiff”), individually and on behalf of the Settlement Class¹, seeks preliminary approval of the proposed Settlement Agreement with Defendant A-Check America Inc. d/b/a A-Check Global (“Defendant” or “A-Check”). The Settlement Agreement between Plaintiff and Defendant (collectively, the “parties”), if approved, will resolve all claims of the Plaintiff and all members of the Class in exchange for Defendant’s agreement to undertake various changes in its practices, and to pay four hundred thousand dollars (\$400,000) into a common settlement fund.

The proposed Settlement of this action is the product of hard-fought and lengthy arm’s-length negotiations by experienced and informed counsel and warrants preliminary approval, as the terms are “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2).

II. RELEVANT FACTS

A. THE PARTIES ENGAGED IN LITIGATION, FORMAL AND INFORMAL DISCOVERY, AND MEDIATION BEFORE REACHING THIS SETTLEMENT

1. Procedural History

Prior to reaching the Settlement Agreement in this matter, this case was actively litigated. On December 3, 2015, Plaintiff Smith filed his proposed class action against A-Check in the Superior Court of the State of California. On January 29, 2016, A-Check removed the lawsuit to this Court. On February 17, 2016, Plaintiff filed his First Amended Complaint (“FAC”). (ECF No. 15.) On behalf of himself and the proposed class, Plaintiff Smith

¹ Unless otherwise explicitly defined herein, all terms have the same meanings as those set forth in the Class Action Settlement Agreement (“Settlement Agreement” or “Settlement”), attached to the Declaration of Joseph C. Hashmall (“Hashmall Dec.”) as Exhibit 1.

1 sought statutory damages of between \$100 and \$1000 per violation, plus
2 attorneys' fees, costs, and all other available relief. *Id.* Defendant moved to
3 dismiss the FAC, a motion the Court denied. (ECF Nos. 28, 35.) Defendant
4 filed its Answer on May 6, 2016. (ECF. No. 36.)

5 During the litigation, the parties exchanged numerous pieces of
6 information through both formal and informal discovery. In formal discovery,
7 both parties produced hundreds of pages of documents, and Plaintiff also
8 received significant discovery from a third party subpoena directed at an
9 industry organization. Hashmall Dec. ¶ 3. Additionally, Plaintiff deposed
10 Defendant's Rule 30(b)(6) designee. *Id.* In advance of mediation, the parties
11 also worked cooperatively to exchange information regarding how
12 Defendant's electronic systems could be queried to identify members of the
13 classes. *Id.* ¶ 4. In service of this effort, the parties engaged in numerous
14 conference calls, some of which included technical consultants advising the
15 parties on how best to extract information from Defendant's databases. *Id.* ¶
16 5.

17 On December 1, 2016, the parties attended a full-day mediation. Prior
18 to this successful mediation, both parties prepared mediation briefs indicating
19 their positions on the merits of Plaintiff's claims and on an appropriate
20 settlement value and structure. *Id.* ¶ 6. The mediation, conducted by Joan
21 Kessler, an experienced third-party mediator, culminated in both parties
22 signing a binding Terms Sheet, which served as the basis for the instant
23 Settlement Agreement. *Id.* ¶ 7.

24 **2. Summary of Plaintiff's Settled Claims Against** 25 **Defendant**

26 All the settled claims relate to background checks that Defendant
27 produced on job applicants. As expressed in the First Amended Complaint
28

(ECF No. 15.), the FCRA prohibits a consumer reporting agency (“CRA” or “agency”) from including non-conviction adverse information older than seven years.

Plaintiff Smith alleged that Defendant violated the FCRA by producing a background report that included information relating to non-convictions that predated the report by more than seven years.

Defendant denies any liability for these claims.

To avoid the further costs and burdens of litigation, the parties have agreed to settle the claims. The proposed Settlement Class consists of the approximately 2,717 persons who Defendant has identified as (1) having been the subject of a background report prepared by A-Check, (2) whose background report contained one or more items of criminal information which were non-convictions predating the report by more than seven years, and (3) whose report was issued at any time dating from February 17, 2014 to the date of the Settlement Agreement, January 27, 2017. Ex. A., Settlement Agreement, ¶ 27.

The Settlement Class Members will release all claims arising under 15 U.S.C. § 1681c of the FCRA and any analogous state law claims.

3. Settlement Negotiations

On December 1, 2016, the parties engaged in a full day of vigorous, arm’s-length negotiations in a mediation with Joan Kessler. At the conclusion of this mediation, the parties reached an agreement as to the material terms of a settlement. While the parties negotiated the case, the parties did not negotiate any terms relating to attorneys’ fees for Plaintiff’s counsel or incentive awards for the Named Plaintiff until after all other material terms were agreed upon. Settlement, ¶ 36-37. The material terms of the Settlement were reduced to a terms sheet signed at the conclusion of mediation. In negotiations over

subsequent weeks, a full Settlement Agreement was reached and executed.

B. THE PARTIES' SETTLEMENT AGREEMENT

1. Overview of Terms and Settlement Administration

In consideration for the release of the Settlement Class Members' claims, A-Check has, first, implemented an automated process to screen out information that should not be reported under 15 U.S.C. § 1681c. Ex. A, Settlement Agreement ¶ 30. Defendant agrees to keep this process in place for at least two years after the Settlement's Effective Date unless the Defendant believes in good faith that a change in existing law warrants a departure from this practice.

Second, Defendant has implemented procedures to ensure that criminal charges which are dismissed due to amendment prior to conviction are no longer reported after seven years. Ex. A, Settlement Agreement ¶ 31. Defendant agrees to keep this process in place for at least two years after the Settlement's Effective Date unless the Defendant believes in good faith that a change in existing law warrants a departure from this practice.

Third, Defendant agrees to provide Class Members who request a copy of their background report with a copy, free of charge. Ex. A., Settlement Agreement ¶ 32. The benefit of these three non-monetary provisions is substantial both for Settlement Class Members and future applicants for employment who have their background reports prepared by A-Check.

Finally, A-Check will deposit the Gross Settlement Amount ("GSA") of \$400,000 with the Settlement Administrator for the benefit of the Class. Settlement Agreement ¶ 33.

After the deductions for any Court-awarded attorneys' fees, litigation expenses, settlement administration costs, and Named Plaintiff service award, this fund will be distributed to all Settlement Class Members who do not opt

1 out. *Id.*, ¶ 20. Defendant, in assembling the class list, shall note which
 2 Settlement Class Members had outdated information related to criminal
 3 charges on their reports, and which Settlement Class Members had only
 4 outdated information related to traffic offenses on their reports. The net
 5 settlement fund shall be distributed to Settlement Class Members such that
 6 individuals with any outdated criminal charges on their reports shall receive a
 7 payment four times greater than those with only outdated traffic violations on
 8 their reports. *Id.*, ¶ 35.

9 If settlement checks are not cashed, those funds will be donated to the
 10 *cy pres* recipient, the Southern Center for Human Rights in Atlanta, subject to
 11 Court approval. *Id.*, ¶¶ 15, 39. No portion of the settlement fund will revert
 12 to the Defendant in any circumstance. *Id.* ¶ 34.

13 After a competitive bidding process, class counsel has selected
 14 Kurzman, Carson Consultants, an independent third party, to serve as the
 15 Settlement Administrator in this case. Settlement Agreement, ¶ 26. The
 16 Settlement Administrator will undertake mailing notice, mailing of settlement
 17 payments, and other administrative tasks. *Id.*, ¶¶ 41-44. All fees and expenses
 18 charged by the administrator will be deducted from the settlement fund, up to
 19 a total of \$23,000, subject to Court approval. *Id.*, ¶ 38.

20 **2. Form of Notice to Settlement Class Members**

21 The parties have agreed to a notice procedure which will ensure that
 22 Class Members receive notice of the Settlement by making settlement
 23 information available via two means: direct mail and a settlement website.
 24 First, the parties have agreed to the Postcard Notice attached as Exhibit B to
 25 the Settlement Agreement, subject to the Court's approval.

26 The Postcard Notice, a double-sided postcard, will inform Class
 27 Members of the basic information about the Settlement, and will be mailed via
 28

1 first-class U.S. mail to each Settlement Class Member. *See* Settlement
 2 Agreement, Ex. B. The Postcard Notice will also inform Class Members of a
 3 variety of means to receive additional information about the Settlement,
 4 including the URL of the settlement website – which will include the long-
 5 form notice described below – and the toll-free telephone number which can
 6 be used to provide Class Members with information about the Settlement and
 7 will allow Class Members to provide their updated contact information. *Id.*
 8 The Postcard Notice will be mailed, by first-class mail, to each known
 9 Settlement Class Member at the last known available address in A-Check’s
 10 database, as updated by the National Change of Address Database. Settlement
 11 Agreement ¶ 42.

12 On the settlement website, the Long Form Class Notice will be made
 13 available, as will a number of other important documents regarding the
 14 Settlement. Among other things, the Long Form Class Notice, attached as
 15 Exhibit E to the Settlement Agreement, informs Class Members of:

- 16 a. The subject matter of this lawsuit;
- 17 b. The material terms of the Settlement Agreement, including
 18 the amount of recovery and the manner in which the
 19 settlement fund will be divided;
- 20 c. The scope of the release;
- 21 d. The right to object to the proposed Settlement, and the
 22 deadlines and procedures for doing so;
- 23 e. The right to opt-out of the proposed Settlement, and the
 24 deadlines and procedures for doing so;
- 25 f. The fact that if Class Members do not opt out of the
 26 Settlement Class, they will be bound by the Settlement;
- 27 g. The proposed deductions from the settlement fund,

including both the percentage and amount to be requested by class counsel, and the amount to be requested for the Named Plaintiff's service award; and

h. The date, time and location of the Final Fairness Hearing.

When, as here, Class Members and their addresses can be ascertained, notification by mail is the best notice practicable and meets the due process requirements of Fed. R. Civ. P. 23(c). *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). In an effort to ensure the efficacy of the notice program, however, the parties have also agreed to undertake two additional efforts to provide notice to the Class. First, the parties have agreed to implement a settlement website established and maintained by the Settlement Administrator which will contain additional information about the Settlement and allow Class Members to update their addresses. Settlement Agreement ¶ 43. Second, the Settlement Administrator will establish a toll-free telephone number with an Interactive Voice Response system to provide Class Members with information about the Settlement and allow Class Members to provide their updated contact information. *Id.*, ¶ 44.

These extensive efforts to provide notice to the Class are "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). A-Check will also comply with the notice requirements of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715(b), by providing notice of this proposed Settlement to appropriate state officials for each state in which a Named Plaintiff or Settlement Class Member resides and upon the U.S. Attorney General. Settlement Agreement, ¶ 15.

3. Opt-Out Right

The parties propose that the Settlement Class be certified pursuant to Fed. R. Civ. P. 23(b)(3). Settlement Class Members may send opt-out requests

1 to the address contained in the Notice, and the Settlement Administrator will
 2 maintain that address. Settlement Agreement, ¶ 22, 45. The deadline for Class
 3 Members to opt out of the Settlement will be forty-five days after the date
 4 notices are mailed. *Id.*

5 **4. Right to Object**

6 Class Members who wish to object to the Settlement Agreement must
 7 file a written statement of objection with the Clerk of Court, and mail the same
 8 to the Settlement Administrator no later than the Objections Deadline, which
 9 will be forty-five days after the date notices are mailed. *Id.*, ¶¶ 22, 46.
 10 Settlement Class Members who fail to make objections in the manner specified
 11 above shall be deemed to have waived their objections. *Id.*, ¶ 46.

12 **5. Attorneys' Fees, Expenses, and Service Award**

13 The Settlement Agreement states that class counsel's fees and service
 14 awards for the Named Plaintiff are to be deducted from the fund, subject to
 15 Court approval. Settlement Agreement ¶ 20. Counsel is authorized to petition
 16 for up to one-third percent of the fund as attorneys' fees, as well as
 17 documented, customary expenses, and \$3,500 for the Class Representative as
 18 a service award. *Id.* ¶¶ 36-37. Class counsel will formally make this request
 19 no later than fourteen (14) days before the Opt-Out and Objection Deadline,
 20 and will post the motion papers on the settlement website, so that Class
 21 Members will have a chance to review them before deciding whether to object
 22 or opt out. *Id.* ¶ 52. Neither settlement approval nor the size of the settlement
 23 fund are contingent upon approval of any requested fees or class representative
 24 service awards.

25 **III. ARGUMENT**

26 Federal courts favor the voluntary resolution of litigation through
 27 settlement, particularly in the class action context. *San Francisco NAACP v.*
 28

1 *San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1029 (N.D. Cal. 1999)
 2 (“There is a strong judicial policy in favor of settlements in complex class
 3 actions”); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.
 4 1992) (noting “strong judicial policy that favors settlements, particularly
 5 where complex class action litigation is concerned”); *Armstrong v. Board of*
 6 *Sch. Directors*, 616 F.2d 305, 312-13 (7th Cir. 1980); *Franks v. Kroger Co.*,
 7 649 F.2d 1216, 1224 (6th Cir. 1981) on reh’g, 670 F.2d 71 (6th Cir. 1982);
 8 *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999).

9 These considerations apply here. For the reasons set forth below, the
 10 Court should grant preliminary approval of the Settlement, and authorize the
 11 issuance of notice to the Class.

12 **A. CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE**

13 The parties request that the Court certify the Settlement Class under
 14 Federal Rule of Civil Procedure 23 for settlement purposes only. Even a class
 15 certified for settlement purposes must satisfy the requirements for class
 16 certification pursuant to Rule 23, though the Court “need not inquire whether
 17 the case, if tried, would present intractable management problems, *see* Fed. R.
 18 Civ. P. 23(b)(3)(D), for the proposal is that there be no trial.” *Amchem*
 19 *Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The proposed Settlement
 20 Class here meets the prerequisites for certification under Rule 23(a) and
 21 23(b)(3).

22 **1. The Prerequisites of Rule 23(a) Are Met**

23 Under Rule 23(a), a class may be certified only when (1) the class is so
 24 numerous that joinder of all members is impracticable; (2) there are questions
 25 of law or fact common to the class; (3) the claims or defenses of the
 26 representative parties are typical of the claims or defenses of the class; and (4)
 27 the representative parties will fairly and adequately protect the interests of the
 28

1 class. The proposed Settlement Class meets these requirements.

2 a. The Proposed Settlement Class Meets the
3 Numerosity Requirement

4 Fed. R. Civ. P. 23(a)(1) requires a proposed class be “so numerous that
5 joinder of all members is impracticable.” In this case, where the Class consists
6 of approximately 2,717 people, there is no question that the numerosity
7 requirement is met.

8 b. The Class Shares Common Questions of Law and
9 Fact

10 A proposed class satisfies the “commonality” requirement “if there are
11 questions of fact and law which are common to the class.” Fed. R. Civ. P.
12 23(a)(2). This requirement, however, has been

13 construed permissively. All questions of fact and law need not be
14 common to satisfy the rule. The existence of shared legal issues
15 with divergent factual predicates is sufficient, as is a common
16 core of salient facts coupled with disparate legal remedies within
the class.

17 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

18 Commonality has been found in similar cases in which it was alleged a
19 consumer reporting agency reported outdated adverse information in violation
20 of 15 U.S.C. § 1681c. *Hawkins v. S2Verify*, No. C 15-03502 WHA, 2016 WL
21 3999458, at *3 (N.D. Cal. July 26, 2016) (finding commonality, certifying
22 class based on claim of reporting of outdated criminal information); *Massey v.*
23 *On-Site Manager, Inc.*, 285 F.R.D. 239, 244 (E.D.N.Y. 2012) (finding
24 commonality, certifying class, in case where consumer reporting agency
25 reported outdated information on class members’ reports)

26 FCRA classes are frequently certified in cases in which a defendant’s
27 uniform policies and procedures impacted class members in the same way.

1 *See, e.g.; Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402 (E.D. Pa.
 2 2010) (finding commonality and certifying FCRA class when defendant
 3 consumer reporting agency's consumer reports all contained the same illegal
 4 statement regarding outdated information); *Campos v. ChoicePoint, Inc.*, 237
 5 F.R.D. 478, 485 (N.D. Ga. 2006) (finding commonality and certifying FCRA
 6 class when defendant consumer reporting agency consistently and as a matter
 7 of policy failed to provide full file disclosures to consumers who requested
 8 them); *Summerfield v. Equifax Info. Servs. LLC*, 264 F.R.D. 133, 139 (D.N.J.
 9 2009) (finding commonality and certifying FCRA class when consumer
 10 reporting agency sent allegedly misleading form letter to consumers who
 11 disputed information on their reports); *Chakejian v. Equifax Info. Servs. LLC*,
 12 256 F.R.D. 492 (E.D. Pa. 2009) (same); *Gillespie v. Equifax Info. Servs., LLC*,
 13 05 C 138, 2008 WL 4614327, *4 (N.D. Ill. Oct. 15, 2008) (finding
 14 commonality and certifying FCRA class when consumer reporting agency's
 15 standard procedure allegedly caused inaccurate reporting); *Williams v.*
 16 *LexisNexis Risk Mgmt. Inc.*, CIV A 306CV241, 2007 WL 2439463 (E.D. Va.
 17 Aug. 23, 2007) (finding commonality and certifying FCRA class when claim
 18 revolved around consumer reporting agency's procedures for notifying class
 19 members that adverse public record information about them was being
 20 reported).

21 Because the core question in this case is whether Defendant's reporting
 22 of outdated information violated the FCRA, commonality has been
 23 established.

24 c. The Named Plaintiff's Claims Are Typical

25 A named plaintiff's claims are typical if "they are reasonably co-
 26 extensive with those of absent class members; they need not be substantially
 27 identical." *Hanlon*, 150 F.3d at 1020.

1 In this case, Named Plaintiff's claims are identical to the claim of every
 2 other Class Member, and are based upon the same legal theory. When every
 3 member of the Class, including Named Plaintiff, suffered the same FCRA
 4 violation based upon Defendant's preparation of background reports with
 5 criminal information more than seven years old, it is manifestly clear that
 6 Named Plaintiff's claims are typical. Claims of this sort are routinely found
 7 typical. See *Hawkins*, 2016 WL 3999458, at *4 ("Plaintiff's claims are typical
 8 of the class. Like potential class members, his consumer report contained non-
 9 conviction criminal history older than seven years."); *Massey*, 285 F.R.D. at
 10 245 ("plaintiff has demonstrated that she is typical of the class. Defendant
 11 issued a report about her that illegally contained outdated information as a
 12 result of the flaw in defendant's system, just as it did, by definition, for every
 13 class member").

14 d. The Class Representative's Interests Are Aligned
 15 with Those of the Settlement Class, and the Class
 16 Representative Will Vigorously Represent the Class
 17 Through Qualified Counsel

18 To make a determination on adequacy, the Court must evaluate both the
 19 Named Plaintiffs and their counsel:

20 Resolution of two questions determines legal adequacy: (1) do
 21 the named plaintiffs and their counsel have any conflicts of
 22 interest with other class members and (2) will the named
 23 plaintiffs and their counsel prosecute the action vigorously on
 24 behalf of the class?

24 *Hanlon*, 150 F.3d at 1020.

25 The resolution of the first question is simple: the Named Plaintiff and
 26 his counsel have no known conflicts of interest with the Class. Hashmall Dec.

27 ¶ 8. Second, both the Named Plaintiff and his counsel have vigorously worked
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1 in the best interest of the Class, and will continue to do so. *Id.* ¶ 9.

2 The Named Plaintiff has been actively engaged in this case. He
3 understands what it means to be a class representative and will put the interests
4 of the Class first in making all decisions related to this case. He has reviewed
5 the Settlement Agreement and believes that it is in the best interest of the Class.
6 *Id.* ¶ 10. Furthermore, the Named Plaintiff's actions demonstrate his
7 involvement in, and dedication to, this litigation. Named Plaintiff has provided
8 counsel with extensive documentation regarding his experiences with
9 Defendant, stayed abreast of developments in this case, and evaluated and
10 executed the Settlement Agreement. *Id.* ¶ 11.

11 Second, Named Plaintiff's counsel is highly experienced in complex
12 class action litigation and consumer litigation in general. *See* Hashmall Dec.,
13 Ex. 2, Firm Resume. Berger & Montague ("Berger") was founded in 1970,
14 and has been concentrated on representing plaintiffs in complex class actions
15 ever since. *Id.* The firm has been recognized by courts for its skill and
16 experience in handling major complex litigation. *Id.* Berger has been
17 recognized by the National Law Journal in 11 of the last 15 years for its "Hot
18 List" of top plaintiffs' oriented litigation firms in the nation. *Id.*

19 In sum, the numerosity, commonality, typicality, and adequacy
20 requirements of Rule 23(a)(1)–(4) are met here.

21 **2. The Prerequisites of Rule 23(b) Are Met**

22 The Settlement Class's claims also meet the predominance and
23 superiority prerequisites of Fed. R. Civ. P. 23(b)(3). In evaluating this prong,
24 the court may consider Class Members' interests in prosecuting their claims
25 individually, the extent and nature of litigation thus far, and the desirability of
26 concentrating the litigation in the particular forum. Fed. R. Civ. P.
27 23(b)(3)(A)–(C). In the context of a class-wide settlement, the court need not
28

1 consider whether the case, if tried, would present difficult management
2 problems. *Amchem*, 521 U.S. at 620. Those requirements are met in this case.

3 a. Common Questions of Law or Fact Predominate

4 When considering predominance, the core issue is “whether the
5 proposed classes are sufficiently cohesive to warrant adjudication by
6 representation.” *Amchem*, 521 U.S. at 623.

7 In this case, three class-wide issues predominate over any individual
8 concerns. First and most important is the question of whether the preparation
9 of reports by Defendant that included criminal non-convictions older than
10 seven years violated the FCRA. Because each Class Member was a subject of
11 one of these particular background reports, a determination of this question
12 will completely obviate the need for an examination of any individual issues
13 relative to individual Class Members. *Hawkins*, 2016 WL 3999458, at *6 (The
14 question of whether these practices [reporting outdated criminal information]
15 violated the FCRA, and whether any such violations were willful, can be
16 demonstrated on a class-wide basis.”); *Massey*, 285 F.R.D. at 245 (finding
17 commonality, because “the central issues of whether defendant issued reports
18 containing obsolete information about members of the class and whether it did
19 so willfully can be proved on a generalized basis through records and
20 testimony from defendant.”)

21 Second, the willfulness of Defendant’s violation presents a critical
22 common question. The ability of Class Members to obtain statutory damages
23 is contingent upon a finding that Defendant’s violation was willful. 15 U.S.C.
24 § 1681n(a)(1). Because Defendant is a single entity, which prepared
25 background reports in the same manner for every member of the Class, the
26 answer to the question of whether Defendant’s violation was willful can be
27 determined on a class-wide basis. *Chakejian*, 256 F.R.D. at 500 (“Thus, the
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1 inquiry is to [defendant's] state of mind in implementing its policies and
 2 procedures, not on the customer's particular interaction with the CRA.... To
 3 prove willfulness here, a consumer-by-consumer inquiry is not necessary.”).
 4 Again, Defendant denies any liability for these claims or that it acted willfully.

5 Third, if this case were litigated, the amount of damages could also be
 6 determined on a class-wide basis. Because Plaintiffs sought statutory and
 7 punitive damages, no individual analysis of damages would be required. *See*
 8 *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006). In
 9 determining the amount of statutory damages to impose pursuant to the FCRA,
 10 courts have looked to “the importance, and hence the value, of the rights and
 11 protections” at issue in the case. *Ashby v. Farmers Ins. Co. of Oregon*, 592 F.
 12 Supp. 2d 1307, 1318 (D. Or. 2008); *In re Farmers Ins. Co., Inc., FCRA Litig.*,
 13 741 F. Supp. 2d 1211, 1224 (W.D. Okla. 2010). Consideration of this factor
 14 requires no individual analysis. Thus, virtually every aspect of this case can
 15 be determined on a class-wide basis, and the predominance requirement is met.

16 b. A Class Action Is the Superior Vehicle for
 17 Adjudication

18 To be certified, a class action must be “superior to other available
 19 method for fairly and efficiently adjudicating the controversy.” Fed. R. Civ.
 20 P. 23(b)(3). Again, in the settlement context, the Court need not address the
 21 manageability requirements of Rule 23(b)(3)(D). *Amchem*, 521 U.S. at 620.
 22 Courts in this district have found that “[i]f no viable alternative to a class action
 23 is available, the class action is necessarily the superior method of adjudication.
 24 Where plaintiffs’ anticipated award is relatively small, class actions . . . may
 25 permit the plaintiffs to pool claims which would be uneconomical to litigate
 26 individually.” *Grannan v. Alliant Law Grp., P.C.*, C10-02803 HRL, 2012 WL
 27 216522, *5 (N.D. Cal. Jan. 24, 2012) (internal citation and quotation omitted).

1 Such is the case here.

2 In a matter such as this, where the claims of all Class Members are
3 identical and are based on the same common core of facts, it is clear that
4 adjudicating this matter as a class action will achieve economies of time, effort,
5 and expense, and promote uniformity of results. *Hawkins*, 2016 WL 3999458,
6 at *6 (noting amount of statutory damages, finding that “[a]bsent a class action,
7 individuals would be unlikely to pursue such a relatively small claim given the
8 costs of litigation. A class action is therefore a superior method for resolving
9 these disputes.”); *Massey*, 285 F.R.D. at 245 (finding superiority).

10 **B. THE SETTLEMENT TERMS ARE FAIR, REASONABLE, AND**
11 **ADEQUATE AS SET FORTH UNDER RULE 23(E)**

12 Under Fed. R. Civ. P. 23(e), court approval is required for any
13 settlement agreement that will bind absent class members. *In re Charles*
14 *Schwab Corp. Secs. Litig.*, No. 08-01510, 2011 WL 1481424, at *4 (Apr. 19,
15 2011). This involves a “two-step process.” MANUAL FOR COMPLEX
16 LITIGATION § 30.41, at 236 (3d ed. 1995).

17 First, counsel submit the proposed terms of the Settlement to the court,
18 and the court makes a preliminary fairness evaluation. *Id.*

19 Second, following preliminary approval of the Settlement, Class
20 Members are provided notice of a formal fairness hearing, at which time
21 arguments and evidence may be presented in support of, or in opposition to,
22 the Settlement. *Id.*

23 The determination of whether a proposed Settlement is fair falls within
24 the sound discretion of the district court. *Class Plaintiffs v. City of Seattle*, 955
25 F.2d 1268, 1276 (9th Cir. 1992). However, this discretion is exercised
26 somewhat differently, depending on whether preliminary or final approval is
27 being sought. At the preliminary approval stage, the court is not required to
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1 answer the ultimate question of whether the settlement is fair, reasonable, and
 2 adequate. *See* 5 Moore’s Federal Practice § 23.83[a], at 23-336.2 to 23-339.
 3 Rather, the court simply makes an initial determination concerning whether
 4 the Settlement

5 (1) appears to be the product of serious, informed, non-collusive
 6 negotiations; (2) has no obvious deficiencies; (3) does not
 7 improperly grant preferential treatment to class representatives
 8 or segments of the class; and (4) falls within the range of possible
 approval.

9 *Harris v. Vector Mktg. Corp.*, C-08-5198 EMC, 2011 WL 1627973 (N.D. Cal.
 10 Apr. 29, 2011). In the absence of any “obvious deficiencies,” preliminary
 11 approval should be granted, and notice of the settlement should be directed to
 12 the Class so that Class Members may have a chance to be heard. NEWBERG
 13 ON CLASS ACTIONS § 11:25, *supra*.

14 **C. THE PROPOSED SETTLEMENT MORE THAN SATISFIES THE** 15 **STANDARD FOR PRELIMINARY APPROVAL**

16 The proposed Settlement Agreement in this case, which provides for
 17 substantial prospective relief and a non-reversionary monetary recovery of
 18 \$400,000, more than meets the standard for preliminary approval.

19 **1. The Settlement Is the Product of Serious, Informed,** 20 **Non-Collusive Negotiations**

21 As recounted above, the Settlement in this case was the result of arm’s-
 22 length negotiations facilitated by an experienced and well-respected mediator
 23 after substantial pre-mediation discovery. *See* § III.A.3, *infra*. “An initial
 24 presumption of fairness is usually involved if the settlement is recommended
 25 by class counsel after arm's-length bargaining.” *Riker v. Gibbons*, 2010 WL
 26 4366012, at *2 (D. Nev. Oct. 28, 2010); *see also Hanlon*, 150 F.3d at 1027
 27 (affirming approval of settlement after finding “no evidence to suggest that the
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1 settlement was negotiated in haste or in the absence of information
2 illuminating the value of plaintiffs' claims.'").

3 **2. The Settlement Has No Deficiencies**

4 This settlement achieves a remarkable recovery for the Class, and
5 contains none of the deficiencies which can stand in the way of judicial
6 approval. For instance, the totality of the Settlement will be paid out; there is
7 no reversion to the Defendant. All deductions from the settlement fund, such
8 as attorneys' fees, settlement administration expenses and Named Plaintiff
9 service awards, require judicial approval, and the Settlement is not contingent
10 upon approval of the requested amounts.

11 Additionally, there is no claim form or other unduly burdensome
12 process in place in this proposed Settlement. Rather, every Class Member who
13 does not opt out will receive a payment from the net settlement fund. Class
14 Members do not need to take any action whatsoever in order to receive their
15 payment, making the process as easy as possible.

16 **3. The Settlement Does Not Grant Preferential Treatment**

17 Preferential treatment is also not a concern in this case. The Settlement
18 does call for higher settlement payments for those whose reports contained
19 criminal information older than seven years, as opposed to traffic or other type
20 of information, but this is a rational distinction based on the determination that
21 this population was more likely to have lost a job opportunity based on the
22 reporting of the information at issue.

23 Further, the settlement does call for a service award for the Named
24 Plaintiff, but that award is subject to the Court's review and approval. The
25 Ninth Circuit has recognized that service awards to named plaintiffs in a class
26 action are permissible and do not render a settlement unfair or unreasonable.
27 *See Stanton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003); *Rodriguez v. W.*

1 *Publ'g Corp.*, 563 F.3d 948, 958-69 (9th Cir. 2009).

2 **4. The Settlement Falls Well Within The Range of** 3 **Approval**

4 The Settlement in this case is impressive when considering the range of
5 possible recoveries for the Class, the Defendant's affirmative defenses, and the
6 number of procedural hurdles between Plaintiffs and a final judgment. While
7 the exact amount that each Class Member will recover is unknown until the
8 amount of attorneys' fees, Class Representative awards, and administration
9 costs are finalized, the Gross Settlement Amount of \$400,000 is substantial,
10 and Class Members are likely to recover a substantial portion of what they
11 could have recovered in litigation. In circumstances such as this, where a
12 settlement fund is calculated to pay out in its entirety, and where class
13 members are likely to receive a good result, a settlement should be approved.

14 This recovery is substantial. Plaintiffs filed this case seeking statutory
15 damages under the FCRA, which provides for damages of between \$100 and
16 \$1000 for each willful violation. 15 U.S.C. § 1681n(a)(1). The settlement
17 here, a \$400,000 fund for a class of 2,717 individuals, is just shy of \$150 per
18 Class Member – well within the range of recovery.² Additionally, the FCRA
19 itself does not provide any guidance to courts in choosing the appropriate
20 recovery for a statutory violation, *see* 15 U.S.C. § 1681n(a)(1), but in
21 determining the amount of statutory damages to impose pursuant to the FCRA,
22 courts have looked to “the importance, and hence the value, of the rights and
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24 ² This number is based on the simple division of the gross settlement fund by
25 the number of Class Members, and is not an indication of the amount that each
26 Class Member will receive. As described above, the actual recovery for each
27 Class Member will depend on (1) the amount of attorneys' fees, costs and class
28 member service award approved by the Court, and (2) the relative proportion
of the class with criminal, rather than traffic, charges on their reports.

1 protections” at issue in the case. *Ashby*, 592 F. Supp. 2d at 1318; *In re Farmers*
2 *Ins. Co., Inc., FCRA Litig.*, 741 F. Supp. 2d at 1224. It is uncertain here how
3 much the court would choose to award for statutory damages. A recovery of
4 a substantial percentage of the likely award if this case had proceeded all the
5 way through final judgment is an excellent recovery for the Class. *See City of*
6 *Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n. 2 (2d Cir. 1974) (“there is no
7 reason, at least in theory, why a satisfactory settlement could not amount to a
8 hundredth or even a thousandth part of a single percent of the potential
9 recovery”) *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*,
10 209 F.3d 43 (2d Cir. 2000).

11 The impressive nature of this recovery comes into even sharper focus
12 when the risks of further litigation are considered. Plaintiff had yet to survive
13 a motion for class certification, summary judgment or trial. Plaintiff was
14 confident that these obstacles could have been overcome, but each of these
15 phases of litigation presents serious risks, which the Settlement allows Named
16 Plaintiff and Class Members to avoid. *See, e.g., In re Painwebber Ltd.*
17 *P’ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) (“Litigation inherently
18 involves risks.”).

19 Viewed in the context of the litigation risks faced, as well as the
20 substantial delay and costs that Class Members would have experienced in
21 order to receive proceeds from an adversarially-obtained judgment, not to
22 mention the judicial resources required, this Settlement is in the best interests
23 of the Named Plaintiff and the Settlement Class Members, and should be
24 approved.

25 **D. THE COURT SHOULD APPROVE DISSEMINATION OF THE**
26 **PROPOSED CLASS NOTICE**

27 With this motion, Plaintiff has provided two forms of proposed class
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notice: one to be sent to all Class Members by first-class mail and one to be posted on the settlement website. Settlement Agreement, Exs. B, E. These proposed notices include all of the information required by Fed. R. Civ. P. 23(c)(2)(B). The Long Form Notice, which is to be posted at the settlement website, and which the Postcard Notice directs Class Members to consult, contains details about the definition of the Class, the proposed class counsel, the size of the settlement fund, the methodology for opting out of or objecting to the Settlement, the potential size of Plaintiff's request for attorneys' fees, expenses, and Class Representative incentive awards, and the date and location of the final approval hearing. This notice program exceeds the requirements of Fed. R. Civ. P. 23, and should be approved.

IV. CONCLUSION

Based on the foregoing, the Court should grant preliminary approval to the proposed Settlement.

Dated: January 30, 2017

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Dated: January 30, 2017

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